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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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DAVID LANE JOHNSON,

Plaintiff, New York, N.Y.

v. 17 Civ. 5131(RJS)

NATIONAL FOODBALL LEAGUE PLAYERS ASSOCIATION, NATIONAL FOOTBALL LEAGUE, and NATIONAL FOOTBALL LEAGUE MANAGEMENT COUNCIL,

Defendants.
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August 24, 2017
10:45 a.m.

Before:

HON. RICHARD J. SULLIVAN,

District Judge

APPEARANCES

ZASHIN & RICH CO., L.P.A.
Attorneys for Plaintiff
BY: STEPHEN S. ZASHIN

WINSTON & STRAWN, LLP
Attorneys for Defendant National Football League Players Association
BY: JEFFREY L. KESSLER
ISABELLE MERCIER

AKIN GUMP STRAUSS HAUER & FELD, LLP
Attorneys for Defendants National Football League and National Football League Management Counsel
BY: ESTELA DIAZ
DANIEL L. NASH
M. CHRISTINE SLAVIK

THE COURT: This is Johnson v. NFL Players Association *et al*.

Let me take appearances for the plaintiff.

MR. ZASHIN: Yes, your Honor. Steve Zashin, from Zashin & Rich.

THE COURT: Okay. Mr. Zashin, good morning. You came in from Ohio just for this?

MR. ZASHIN: Yes, your Honor.

THE COURT: I always feel bad dragging people here from far away, but I guess it is unavoidable and probably it is good that you are here today; but, in the future, if for whatever reason you think you would rather stay home and do this on a video screen, you can always ask, okay?

MR. ZASHIN: Thank you, your Honor.

THE COURT: Great. Good morning to you.

And then for the defendants we have several defendants, so I guess I will just take them from my left to right.

MR. KESSLER: Good morning, your Honor. Jeffrey Kessler, from Winston & Strawn, on behalf of the NFL Players Association.

THE COURT: Okay. Mr. Kessler. Good morning to you. Next to you?

MS. MERCIER: Isabelle Mercier, Winston & Strawn, for

defendant NFLPA as well.

THE COURT: Okay. Let me see. Are you on the docket sheet here?

MS. MERCIER: I don't think I am on the docket.

THE COURT: Okay. So let's have you file a notice of appearance so you are on there. Great. Good morning.

Next?

MS. DIAZ: Good morning, your Honor. Estela Diaz, from Akin Gump Strauss Hauer & Feld, on behalf of the NFL and the NFL Management Council.

THE COURT: Okay. Ms. Diaz, good morning.

Here is a familiar face.

MS. SLAVIK: Good morning. Christie Slavik, your Honor, for the NFL defendants, as well.

THE COURT: Ms. Slavik, good morning to you. I should note for the record, just so everybody knows, Ms. Slavik was my law clerk six years ago? five years ago? four years ago?

MS. SLAVIK: A long time ago. Five years ago.

THE COURT: Anyway, she was a very good law clerk and we keep in touch, but we don't talk about cases. I have other cases that she appears in front of me on. I have other former clerks who appear in front of me. My general policy is within the first two years of leaving chambers I entertain a recusal motion or think about recusing; but, after that, even in New York it is a small legal community, and if you were recused

every time you bumped into somebody you knew, you would be out of business. But I tell you that just in the interest of full disclosure. Okay?

MR. ZASHIN: Thank you, your Honor.

THE COURT: Last?

MR. NASH: Good morning, your Honor. Daniel Nash, from Akin Gump, on behalf of the NFL defendants.

THE COURT: Okay. Mr. Nash, you are up from DC?

MR. NASH: That's correct.

THE COURT: Same deal. You can't beat being here in person, but if, for whatever reason, in the future you want to entertain appearing telephonically or by video conference, I will never be annoyed if you ask. I might say no, but I won't be annoyed.

MR. NASH: Thank you.

THE COURT: This is a case with a history that predates me. Obviously this was kicking around in Ohio for quite a while, and then it was transferred here, with some motions and other things sort of pending.

It is a fairly complicated case procedurally with multiple defendants and different claims, so I have gone through it all, I understand it, but I want to make sure everybody understands the ground rules for a conference like this, and some of you may have heard me say this at the conference before this one. I have a requirement that the

parties submit premotion letters of three pages and the other side responds within three business days and then we come together within a week or two typically and then we talk about it.

I don't do this to discourage motions, I don't do this to make work for lawyers. I do it, frankly, because I just think it helps me get engaged, it helps me to understand the issues, and it helps me to, I think, hopefully add value to the process before you have really gotten invested. At the very least, it can inform how you brief a case and brief issues, and in some cases it can affect whether you wish to go forward with a particular motion. But I never tell a party they can't make a motion nor do I view this as kind of the last word on it. It is sort of the first step in a process. And sometimes it is very clear to me that a motion is a winner or a loser, and if that's the case, then I will say that. Often it is not completely clear, but there are things I would like to just have clarified for me either factually or on the law, and it is useful to have you here. So that's the thinking behind this. Okay?

So I note this is a case in which there were motions that were made and fully briefed in Ohio that weren't fully resolved, and so there is some fuller briefing. But I think I would prefer to have, even if the same motions get made again, at the risk of sort of making you folks work and spend your

clients' money, we are in a different circuit with different authority, and I think it is going to make sense that we are going to have to rebrief some of these issues anyway. But I still think it is useful to talk about it.

This is a case that is styled obviously as a petition to vacate an arbitral award, but it also has sort of individual causes of action against some of the defendants, which are just standalone causes of action, so that makes the petition really more akin to sort of just a straight complaint. So I think that's where I want to start, I guess, because I think it will inform the standard to be applied and the deference to be accorded to an arbitral award once we sort of flesh out the allegations of breach by the union and those affiliated with the union. I guess that's really where I want to start.

Mr. Johnson is alleging that he basically was sold out by the union, the union breached its duty of fair representation under a number of different provisions, including the LMRA, but also the FAA, and I guess I want to start with the FAA. Does that really apply here with respect to the cause of action for a breach of the duty of fair representation?

MR. ZASHIN: Your Honor, Steve Zashin on behalf of Mr. Johnson.

THE COURT: Yes.

MR. ZASHIN: I think the issue as to whether or not

the FAA applies in this context remains unsettled. Recently, the NFLPA actually filed a motion in the District Court of Minnesota seeking to vacate an arbitration award involving Mr. Peterson and filed that action both under the Labor Management Relations Act as well as the Federal Arbitration Act.

What I would tell the court is, at least under Second Circuit law, there is a case called the *Coca-Cola* case, which was a February 2001 case. However, immediately following that case, there was the *Circuit City* v. *Adams* case, which was decided in March of 2001 in which the Supreme Court had indicated the FAA applies to all arbitration agreements except those that involve transportation workers.

I would then turn the court's attention to footnote 10 of the *Penn Plaza* case, 2009 decision by the Supreme Court. In that footnote, the Supreme Court of the United States stated as follows: "An arbitrator's decision as to whether a unionized employee has been discriminated against on the basis of age in violation of the ADEA remains subject to review under the Federal Arbitration Act."

Therefore, your Honor, in order to protect Mr. Johnson's rights, we filed this action both under the Federal Arbitration Act, Section 10, as well as under the Labor Management Relations Act. For all practical purposes, however, your Honor, the Second Circuit has discerned that the analysis

set forth under the FAA does sort of move its way into the LMRA. So from our --

THE COURT: I think under the *Brady* case basically this is a done deal, right?

MR. ZASHIN: Well, again, your Honor, we have this issue with respect to the Supreme Court's decision in *Penn Plaza*, in footnote 10, because it doesn't seem to square.

THE COURT: I guess that's right. There are oftentimes when the Second Circuit doesn't square with the Supreme Court. *Newman*, for example. But until the Supreme Court slaps them down, I have to follow it. Right? You filed this in Ohio, and so different strokes in Ohio, but here it seems to me that the FAA is kind of off the table unless and until the Second Circuit is persuaded otherwise.

MR. ZASHIN: Your Honor, I believe it is a distinction without a difference simply because the LMRA is informed by the FAA, and the standards for vacatur are essentially the same.

THE COURT: That may be, but you have got different causes of action --

MR. ZASHIN: Correct.

THE COURT: -- that turn on different provisions, and I think probably the FAA ones are out under Second Circuit law. Do you agree with that or no?

MR. ZASHIN: Under Second Circuit law, your Honor, I would agree that the vacatur analysis should be constructed

under the LMRA. I will also say that the motion to transfer or the decision by Judge Lioi relative to the motion to transfer it is unclear from our reading of that case whether or not she transferred the case under 28 U.S.C. 1404 or transferred the case under 28 U.S.C. 1406, and that distinction does potentially make a difference in terms of the law which would applied under this analysis. Because if it's a motion to transfer by virtue of *forum non conveniens*, then the law within the Sixth Circuit would apply. If it is a motion to transfer otherwise, then the law of the Second Circuit would apply. I just point that out from the court's perspective, because I don't believe that that issue was addressed in Judge Lioi's opinion. That said, your Honor, we would consent to the law of the Second Circuit relative to this dispute.

THE COURT: So you stop there. I don't know who is carrying the ball -- that's actually an apt metaphor, isn't it? -- who is carrying the ball for the defendants on this issue.

You got it. Nobody else wanted it.

MR. KESSLER: Your Honor, we agree that the right cause of action for the petition to vacate is under the LMRA in the Second Circuit; that the FAA standards have some relevance because the court has indicated they look to the FAA, but I think in the Second Circuit that's pretty well settled.

THE COURT: All right. So that was a preliminary

issue.

Then I guess I really just want to get to the contemplated motion, basically, is a contemplated motion to dismiss the breach of duty of fair representation claims, which are standalone claims, and it seems to me, at least -- not everybody may agree with this -- it seems to me that it is worth starting there, because how we land on that one will inform, at least to some extent, the deference to be applied with respect to the motion to vacate the arbitral award, a deference that otherwise would be awarded to the arbitrator's decision.

So let me ask you whether you agree with that in terms of whether it makes sense procedurally to be dealing with the breach of the duty of fair representation claim sort of first before we then turn to the inevitable motions to affirm the arbitral award, which would be counterposed by the motion to vacate the arbitral award, which is already basically made.

That's really a question for the defendants.

MR. KESSLER: Your Honor, I would not respectfully agree that it affects the review standard for the petition to vacate. I have no objection to addressing the motion to dismiss first; and, in fact, it is a little bit of a reverse, because the duty of fair representation claim is what we call a hybrid claim.

THE COURT: Right.

MR. KESSLER: It's a hybrid claim where they are alleging that the employer breached the collective bargaining agreement, and the union somehow contributed to that breach in the arbitration.

In that type of a claim, they have to first show that they can vacate, the arbitration will actually ultimately be a prerequisite to serving a hybrid claim against the union. Because if there was no basis to vacate the arbitration, then there is no injury. Your Honor will see a lot of our arguments come back to the complete inability of the plaintiff here to allege injury in a whole variety of different ways.

So, actually, we think both motions should probably be ruled on together because they do have some relationship with each other. So we have no problem with having them briefed at the same time and argued at the same time. But, actually, I think, in terms of order, you probably would want to decide the motion to vacate first to see how that informs the standard with respect to the duty of fair rep argument claim with respect to that.

THE COURT: Let me ask Mr. Zashin that same question.

MR. ZASHIN: Thank you, your Honor.

Respectfully, we agree that the issue relative to whether or not to vacate the arbitration award should come first. What we would say, your Honor -- and this sort of is a follow-up of your questions earlier about whether the FAA

applies, the reason why we filed the motion to vacate initially is because the FAA has a specific three-month window within which to do that. There is no similar window within the LMRA.

What we are simply asking for, we believe, that there is a lot of evidence in this case, factual evidence, that supports our arguments for vacating this arbitrator's award. Primarily, your Honor, there are a number of questions that we believe need to be answered through the course of discovery. Even though we have a lot of information at this point, it has been the, shall I say, the *modus operandi* of the defendants to conceal and hide information from us and from Mr. Johnson relative to the operation of this particular policy, and we believe that questions like, Did the NFLPA ever sign Carter's conflict or engagement letter in which he disclosed a conflict unbeknownst to us that we got notice of two months after these proceedings by virtue of another proceeding on behalf of another player? And your Honor if I could read that --

THE COURT: If you could read what to me?

MR. ZASHIN: The language in that engagement letter, this particular policy, this specific policy, the Performance Enhancing Substances Policy, is extraordinarily clear that in this particular case there had to be a minimum of three arbitrators and a maximum of five. Those three arbitrators were supposed to then elect or designate the notice arbitrator.

In addition, your Honor, and beyond the Second Circuit

law, which is that an arbitrator has a duty to disclose conflicts, this contract went further, and it says that "All appeals under section 6 of this Policy" -- "Policy" is capitalized because it is a defined term -- "shall be heard by third party arbitrators 'not affiliated with the NFL, NFLPA or clubs.'"

Why that is important is because, your Honor, within two months of this award, as a result of a forced disclosure by this arbitrator, he made his first conflict disclosure. It is important to note that he never made any conflict disclosure prior to the arbitration in this case. His engagement letter speaks directly in conflict with the exact language of the 2015 Performance Enhancing Substances Policy, and it states, I quote, "It is possible that, during the time I am acting as an arbitrator, some of Wilmer Hale's present or future clients will be engaged in transactions or encounter disputes with the NFL, the NFL Players Association, NFL teams or owners, or NFL players and other personnel. Likewise, the firm may undertake to represent the NFL, the NFL Players Association, NFL teams, owners, players, or other personnel."

That language, your Honor, stands in direct conflict with the specific language of the Performance Enhancing Substances Policy on page 13. In addition, your Honor, he made an additional disclosure, and this disclosure states as follows: "I am aware that the firm is giving advice to the NFL

with respect to a team ownership matter." That was never disclosed at any point in time by Arbitrator Carter. That is a significant issue. We only learned of that by virtue of another player who objected to his service due to what we perceived at that point was a conflict of interest.

But it goes further than that, your Honor. This particular policy says that there have to be a minimum of three and a maximum of five. We know that there weren't three, okay? But the term "Policy" is specifically defined in the PES policy. It's a defined term. It's a capitalized term. And it says that "all appeals under section 6 of this policy shall be unaffiliated."

What we also didn't know and was also not disclosed at the time was that Arbitrator Carter was simultaneously serving as an arbitrator under a separately defined policy, the Substances of Abuse Policy. Likewise, your Honor, we now have evidence that demonstrates that that policy was likewise separately defined.

THE COURT: Let me just interrupt you for a minute because I think what you are really saying is that we need to go straight to discovery, is what you are saying, right?

MR. ZASHIN: That is correct, your Honor.

THE COURT: So let me hear from the defendants on that. Obviously they don't agree with that.

MR. KESSLER: So, your Honor, no, we do not believe we

should go to discovery. There is a threshold problem with both of his arguments, both in terms of the claims against our union for duty of fair rep and LMRDA, and Mr. Nash can speak to the issue with respect to the petition to vacate.

So with respect to the union claims, he cannot allege the required Article III standing and injury in fact under the Supreme Court's *Spokeo* case, as interpreted by the Second Circuit, for one very specific reason: He has admitted several times, the plaintiff, that he violated the policy by taking a supplement which he knew had a banned substance. That admission, which is undisputed, means the arbitrator had no choice but to find a violation, because it was a strict liability policy, once you have that violation, and the amount of the suspension is specified in the agreement.

So nothing he is alleging about whether there should have been three arbitrators or two arbitrators to be selected or whether it was an adequate disclosure, none of that, in terms of the duty of fair representation claim, could mean anything, because that admission means he was going to be suspended for ten games, which is what happened.

THE COURT: I see Mr. Zashin shaking his head. Mr. Zashin is basically arguing that the deficiencies that are alleged here contributed to the adverse outcome, that it was worse as a result of these things that the union didn't do or should have done and didn't do.

MR. KESSLER: And my point, your Honor, is that that is not possible under the terms of the agreement because the amount of the suspension is automatically specified. It is a second offender, it is ten games. There is no discretion in the arbitrator. Whether or not there is a violation was admitted under the terms of the policy. So once you have an admission by the player that, yes, I took the prohibited substance, and once you know it is a second violation, there is no further discretionary determination to be made by the arbitrator on any issue.

Therefore, what this is, this is a case where the player, rather than recognizing he accepts responsibility that he violated the policy and the penalty, has come up with a host of diversionary points that could have no impact on his argument, and we will demonstrate that in our briefing if your Honor permits us to file with respect to the claims against us on injury about that. So that is I think the essential point.

So we don't think there should be any discovery, your Honor, with respect to our claims.

The other point I make on that is the second part of our motion to dismiss is the standard for DFR claim is that it has to be an arbitrary or discriminatory or bad-faith act, we will also show in the alternative that the acts alleged, like I will give you one example, he claims he should have had a pool of three neutrals, okay, as opposed to two neutrals. That is a

provision that was for the convenience of always having an arbitrator available. All three would have been neutral, all two were neutral and, in fact, on the record, he said he was satisfied with the selection of Mr. Carter as opposed to the other arbitrators available.

So these types of acts, whether or not there should have been three or two, is not going to be discriminatory, bad faith, or arbitrary the way the statute is set forth. So we think we are going to have a second round that he hasn't stated acts which qualify for the claims against the union. Therefore, rather than proceeding to discovery, we would urge the court to consider the motion and stay discovery against the union until that motion is decided.

THE COURT: Mr. Zashin -- I will give you a chance in a minute, but I want to hear Mr. Zashin on that.

I think you seem like you are disputing whether or not there was any discussion here or whether the alleged instances of either bad faith or arbitrary -- well, the breaches by the union contributed to the outcome here. That's what you are saying, right?

MR. ZASHIN: That is correct, your Honor.

THE COURT: So what is the response then --

MR. ZASHIN: Well, first --

THE COURT: -- to the statement that, well, this is cut and dry. This is mandatory minimums. There is no

discretion here.

MR. ZASHIN: Your Honor, with all due respect to Mr. Kessler, he has completely misrepresented the record that has been transcribed in the underlying arbitration proceeding. Mr. Johnson never admitted that he took a banned substance. In fact, the PDS policy, on page 16, sets forth a paradigm that the NFL is required to meet in order to meet its initial threshold burden. This is no different than a *McDonnell-Douglas* burden shifting kind of an analysis.

That paradigm includes three requirements: First, that there is a positive test result; two, that it was obtained pursuant to a test authorized under the policy; and, three, was conducted in accordance with the collection procedures and testing protocols of the policy. It is only then that the burden shifts to the player to establish that there was a problem. That never occurred in this case. There is no confirmed test that this player violated relative to the substance in question. It doesn't exist, and for Mr. Kessler to suggest otherwise is not factually accurate.

Second, your Honor, the arbitrator in this case didn't require that the NFL follow this paradigm. We actually, if you read the transcript, we ask the arbitrator to dismiss the arbitration after the presentation of the NFL's case because it didn't establish these things, which was denied.

But this all goes back to this other problem, which

relates to the arbitrator and the selection of the arbitrator and the appointment of the arbitrator. And your Honor, quite frankly, it troubles me greatly -- you made a disclosure here this morning about one of the attorneys for the NFL, and I appreciate that. But there was never a disclosure made by this arbitrator.

Since this case concluded, we discovered a number of things: We discovered that he was at the same time working under another policy on behalf of the parties, not disclosed. We discovered at the time that this case was pending, his firm was working on matters on behalf of the NFL. There has been a suggestion that we could have figured that out.

THE COURT: I think the main argument is that none of this really matters much is because this is cut and dry, I think is the term Mr. Kessler used, to say that once a player has admitted use, there is a ten-game suspension for a second offense. You are disagreeing, I think, with the characterization of the policy, but I guess that's one I can figure out by looking at the policy, right?

MR. ZASHIN: Your Honor, what Mr. Kessler is confusing is, Mr. Johnson admitted that he took a substance, what he never admitted to taking was a banned substance and the NFL never established that he did so pursuant to the express terms of the 2015 PES policy. That is the difference. That is a significant difference. The arbitrator in this case skipped

over all of that, and we believe that the reason why he did so was because of the conflict that relates to his service under the policy to begin with.

There are a number of questions, your Honor, that we think are pertinent to discerning whether or not this arbitrator had a conflict:

First and foremost was this engagement letter, because if the NFL signed this engagement letter, it modified the express language of the 2015 policy.

Second, your Honor, how much money did the NFL pay Mr. Carter's firm in the years 2014, '15 and '16? Does that influence an arbitrator's decision under a case like this if in fact one of the parties is actually paying for other work done by this particular law firm? I would think, your Honor, that that is a critical question that we should be entitled to find out. How much money did the NFL or its member clubs pay the law firm Wilmer Hale at the time that this man suggested that he was a neutral arbitrator? Never disclosed.

THE COURT: Ms. Diaz, I think, had a point that she wanted to make.

MS. DIAZ: Yes, your Honor. I wanted to address, on behalf of the NFL defendants, our position with respect to discovery.

We do think that discovery is entirely inappropriate prior to the motion to vacate being fully briefed. It runs

completely contrary to the purposes of arbitration, which is a quick and efficient resolution, and in addition runs contrary to the Second Circuit standard in terms of the court's review of these arbitral awards. So on that position we think -- on that issue we think discovery is entirely inappropriate, and we believe there is authority in this --

THE COURT: So you think in your view discovery is never appropriate in connection with a petition to vacate an arbitral award?

MS. DIAZ: Your Honor, we think there is certainly authority that it is inappropriate and unnecessary in this type of proceeding where the arbitral award is given great deference.

THE COURT: It is certainly given great deference, so this is kind of interesting, because normally this is sort of teed up as the equivalent of a motion for summary judgment but with a lot of deference to the arbitrator's decision. But, in essence, we seem to be almost talking about this as though it is going to be a motion to dismiss, and has the petitioner/plaintiff here pled enough facts that do raise concerns about the propriety of this arbitral award?

MS. DIAZ: Right. Your Honor, if I may, many of the issues which Mr. Zashin is now raising today, he raised during arbitration. Our view is that he is essentially seeking to relitigate whether there was a proper test, whether the NFL met

its burden under the policy. Arbitrator Carter already decided those issues, and he is seeking to now litigate those issues -- they those very same issues before another judge.

THE COURT: I get that. But the motion here is to -- he has got a motion to vacate the arbitral award. That's really what this case is about. He also has got causes of action that are standalone causes of action for damages, right, for breach of the duty of fair representation. And then there is a contemplated motion by defendants to, I guess, both dismiss those causes of action that relate to damages and, what, to make a motion to confirm the arbitral award or to dismiss the petition? And what's the difference between those two?

MS. DIAZ: Right. We believe, your Honor, that if Mr. Zashin's motion to vacate the award is denied, that that will dispose of all of the claims against the NFL. There is a breach of contract claim against the NFL, again, on the same bases that Mr. Zashin is bringing his motion to vacate.

In addition, if Mr. Kessler is successful with respect to his motion to dismiss on the DFR claim, the breach of contract claim also goes away because it is a hybrid claim.

Further, we don't believe that it is proper for Johnson to allege a breach of contract claim because this isn't a situation where Mr. Johnson did not participate in the arbitration. The purpose of the hybrid claim is to allow the

employee who did not have the opportunity to participate in an arbitration to bring a claim against his or her employer.

THE COURT: Wait. I want to be clear about this, because I thought I saw this in your letter. Your view is that if the employee participated in the arbitration, he is barred from bringing a claim against the union?

MS. DIAZ: Your Honor, the hybrid claim was not designed to address this situation where the employee actually participates in the arbitration. It was designed --

THE COURT: You cite some cases where the facts were that the employee didn't participate, but are you saying the cases say that that is a requirement, that the employee didn't participate, before you can bring such a claim? Or are you just saying sort of it makes sense to do it that way? No court has held that, has it?

MS. DIAZ: No, your Honor. The logic behind the hybrid claim is to provide an employee with standing to challenge the arbitration.

THE COURT: All right. I'm not sure that it is a requirement that the employee have been sort of unrepresented or not present for the arbitration.

MS. DIAZ: And even if there is no requirement, we believe that the disposition of the DFR claim against the union would also affect disposition of the contract claim against the NFL defendants. If the DFR claim is dismissed, the breach of

contract claim against the NFL defendants must also be dismissed.

THE COURT: All right. I'm going to hear from Mr. Nash. Are you going to speak to any of this?

MR. NASH: No, your Honor.

THE COURT: I thought Mr. Kessler was giving you --

MR. NASH: I would just add one thing to what Ms. Diaz just said about the hybrid claim. One of the things to keep in mind here -- I think Mr. Kessler can speak to this as well -- is the somewhat unusual nature of the NFL bargaining, where here, under the policy, the employee actually has the right to bring the arbitration himself. The traditional hybrid claim, as Ms. Diaz was explaining, are situations where, in most collective bargaining agreements, it is up to the union to decide whether to bring the claim to arbitration. The employee has no right to go to arbitration. And in circumstances where a union for -- and Mr. Kessler is exactly right about what the standard is -- for arbitrary or discriminatory reasons fails to bring an employee's claim to arbitration, then the employee may sue both the employer directly for breach of contract, the claim that he or she would have filed --

THE COURT: But if he participated and the union half-assed it, he can't.

MR. NASH: Right.

THE COURT: Do you have authority for that?

MR. NASH: Well, let me put it this way. Then I think the standard becomes should the award be vacated? Again, this gets us back to what the claim is against the NFL defendants. I think the claim against the NFL defendant is really whether or not the arbitration award can be vacated. If it can't be vacated, there cannot be a claim. So I'm not saying that the employee doesn't have any claim. I'm just saying that the hybrid type claim that they are talking about here.

And it gets back to what Mr. Kessler was saying. So, for example, the arguments that you heard from Mr. Zashin about the selection of the arbitrators and whether or not Mr. Johnson violated the policy, the bias issue, these arbitrators were selected by management and the union, so that question then becomes, was it within the union's discretion to make a judgment about whether or not the fact that everyone knew Wilmer Hale had done -- as did Mr. Johnson's counsel, Peter Gray (phonetic) -- had done work for the NFL before, not Arbitrator Carter, but Wilmer Hale, was it within the union's discretion to agree, well, notwithstanding that Arbitrator Carter is a perfectly fine and very well respected arbitrator, we are okay with him serving as an arbitrator under the policy.

The same thing goes to this argument about they didn't know he was an arbitrator under another policy under the collective bargaining agreement. Again, the question is not

whether that is something Mr. Johnson didn't complain about. The question is, when his union agreed to that, was that within their discretion? And, again, that's why I think Mr. Kessler is absolutely right, it gets back to whether or not these allegations meet the standard on a motion to dismiss that the union somehow acted in an arbitrary or discriminatory way against Mr. Johnson, and there is just no allegation of that.

THE COURT: I want to talk about what this briefing is going to look like, because I'm still unclear exactly as to who is filing first and what it is going to look like and whether it is going to have declarations and affidavits.

So it is your premotion letter that started this thing going, I think, Mr. Kessler.

MR. KESSLER: Yes. Our motion to dismiss is just on the face of the pleadings. There will be no declarations. We are simply going to go through the pleadings, which incorporates, by the way, the decision, so we can refer to what happened in the decision, that's part of it, and it will show that, based on the decision and the proceedings itself in the complaint, that there could be no injury because of the argument we made that it could have no effect on the outcome; and that, secondarily, each of the acts he alleges against the union would not qualify as a matter of law to be bad faith, discriminatory, or within the contemplation of Second Circuit law as something you could claim.

Mr. Nash is right. The normal DFR case in this context is where a union refuses to bring a case at all and it is claimed this is being done for some bad faith or discriminatory reason to the employee. This is a case where, after going through the whole arbitration, agreeing that the arbitrator was acceptable, because it was a choice between the two, losing on the merits because of the admission of the player that he violated the policy, it was a statement he only admitted to taking the substance, but it was undisputed the substance was in violation. So I don't even understand that argument. He admitted that he took the supplement that had the banned substance in it. Once you got to that, arguing that, well, maybe the testing should be challenged doesn't matter. The purpose of the testing is to establish a violation. When a player says, I didn't take it and you prove it through a test or if you admit that -- you know, it's like saying, well, I admit it. I shot the person and killed them, but I don't have the gun.

THE COURT: No. Because saying I admit I took something, but I don't know what it was --

MR. KESSLER: No, no. He admitted a specific substance that contained the banned substance on the list. We will point that all out in the brief. There is no dispute that he took the banned substance and he knew what he was doing. That is not going to be a disputed point in this record. We

will present that, and you can look at arguments of the other side, but that will be there.

THE COURT: So you are then perceiving that you could file a motion to dismiss that is literally just relying on the pleadings and the arbitral award, which is part of the pleadings, incorporated by reference.

MR. KESSLER: And the proceedings in the arbitration which is incorporated. So, like, his admissions in the arbitral hearing, that comes in as well, we believe.

THE COURT: But you would be attaching that as declarations or evidence or exhibits?

MR. KESSLER: Yes. It all will be attached.

THE COURT: And that would be a joint motion of everybody?

MR. KESSLER: No. That's just a motion for the union to dismiss the duty of fair rep claims, the LMRDA claim, which is the damages claims against the union, and also it would include the declaratory judgment claim. For some reason, plaintiff seemed to indicate they didn't realize we would include the declaratory judgment. That's just a judgment that violated the other two laws, so that would be thrown in with that. So it's the three claims against the NFLPA would be in our motion.

THE COURT: Okay. Then Mr. Zashin still has his motion to vacate, right?

MR. KESSLER: That's a separate issue. And our view --

THE COURT: You are responding to that motion?

MR. KESSLER: Yes. Our view is he should be permitted, because that's his whole case, he should be permitted to file his petition to vacate, and we would respond to that, as would the NFLMC.

THE COURT: But, Mr. Zashin, you are planning, if we were to go that route, before discovery, you are going to go ahead and brief this thing, you are planning to what, attach exhibits and affidavits?

MR. ZASHIN: Oh, absolutely.

THE COURT: Things outside of the pleadings.

MR. ZASHIN: Yes, your Honor, because what they failed to mention and what they effectively said is that the written words on the page relative to the 2015 PES policy don't mean what they say they mean. That's troubling.

THE COURT: I'm not sure if that is what they are saying.

MR. ZASHIN: Well, what they are saying is that we only had two arbitrators, even though the policy says three. It says you can't be affiliated, but one was affiliated. Your Honor, to the extent that --

THE COURT: I think what they are saying -- I don't want to put words in your mouth, Mr. Kessler, but I think what

you are saying is that none of those things, even if true, rise to the level of a basis to vacate an arbitral award when, without question, there is no causal relationship between the outcome, the adverse action, and the alleged --

MR. KESSLER: You have articulated it very well, your Honor.

THE COURT: I don't know about that, but I get it, I think.

MR. ZASHIN: If I may, your Honor, the problem is that what effectively the union did was it allowed the NFL to run roughshod over the written words in the actual policy. The problem with that is that the union's own constitution at 6.05 says that the union itself is forbidden from making any amendments to a collectively bargained agreement unless one of two things happened: there is a two-thirds vote by the board of representatives or that it goes to the membership and a majority of the membership approves the modification. This gets back to my issue, your Honor, about what information would be like. Effectively what you have heard today is that the parties have amended, modified, changed the terms of the 2015 policy. I think we are entitled to --

THE COURT: I think the real disagreement here is you are saying that those changes, those amendments, are, by themselves, so violative of the agreement that that is a basis to vacate the award; and I think what the defendants are saying

is, That's not true. Even if everything you say is true about the liberties taken and the shortcuts made, it would have had no impact ultimately on the resolution here because of the admission by your client. And if you can't show that the actions -- either the bad faith actions or the arbitrary actions -- of the union caused the adverse disciplinary ruling, then you are out of luck. I think that's what Mr. Kessler is saying.

MR. KESSLER: Basically, your Honor, as Mr. Nash said, that's what the arbitrator found. Because he argued to the arbitrator, for example, the two versus three point, and the arbitrator listened to that and said, But that has nothing to do with the outcome of this case. And so it has been both arbitrated and it's legally insufficient.

THE COURT: All right. I guess I am still trying to figure out what a briefing schedule looks like. And these are cross motions? Is this briefing on Mr. Zashin's motion to vacate the award in which he is then going to make all his arguments that he has alleged to some extent in his petition already and which he has elaborated upon today and then you guys respond? But at the same time you are filing a separate motion on a parallel track to dismiss the other claims.

MR. KESSLER: We would suggest they just go in parallel, so that we would file our motion to dismiss the same day he files his petition to vacate, then we can do our

oppositions the same day, and do replies the same day. NFL would obviously --

THE COURT: I guess he has already filed his petition to vacate. He is now filing a brief in support of that petition. Right? That's what your pleading --

MR. KESSLER: Well, file a pleading to vacate, whether it is a motion to vacate.

MR. ZASHIN: Your Honor, if I may, the only thing I would suggest to you is, it is in our opinion that, because of the changes to the policy that were unwritten, it is our position that we should receive discovery relative to those changes. And, by the way, if in fact the union did not follow its constitution, its constitution says that those amendments are not binding, and therefore that discovery is critical to determine whether or not these changes, modifications, alterations, side deals between these two parties, whether or not there was effectively collusion between the parties to the disadvantage of the players, that's the type of discovery that we need in order to flesh out the problems, the breach of the duty of fair representation that exists here.

Effectively, your Honor, the union did nothing. It led its players to slaughter. These were lambs. The union itself has said that a player's career is only about three and a half years. This player suffered a ten-game suspension. That's approximately a quarter of his entire career in the NFL.

THE COURT: I get all that. If that is the policy that was executed between the union and the league and if it is as cut and dried as Mr. Kessler says, then it seems to me that your gripe is with the policy, it's not with the arbitration. So I'm not inclined to open this up for discovery at this point. If there are disputed issues of fact, then I think I may need to, but it is not clear to me that there are disputed issues of fact that are material, at least according to what the defendants are saying. They are saying that none of this ultimately matters; that you are going to pepper the record with all sorts of things that shouldn't have happened and things that were cut corners and breaches of the sort of technical terms of the policy, but they don't ultimately affect the outcome. If that's the case, then I'm not sure we need discovery even if they may disagree as to whether you are accurately characterizing the discrepancies and shortcuts taken.

MR. ZASHIN: Your Honor, if I may, just on two brief points.

The Second Circuit has repeatedly held that arbitration is a matter of contract, and courts must rigorously enforce the written terms of the agreement. That's first.

But, second, the Second Circuit has also said that an arbitrator must disclose all nontrivial conflicts. And therefore how can we ever get to whether or not the award drew

its essence out of the contract, which is the ultimate question here, if in fact the arbitrator in question was so conflicted --

THE COURT: Wait a minute. I want to be clear about this. Your view is you get to file a petition, make an allegation of conflict, and then you are entitled to figure out whether that is true?

MR. ZASHIN: No, your Honor.

THE COURT: No.

MR. ZASHIN: No, I don't believe that that's right. But what we have established, your Honor, by virtue of a forced disclosure by this arbitrator, in a proceeding that immediately followed Mr. Johnson, arbitrators are required under the Second Circuit to provide a conflict disclosure. The parties, I think, will stipulate that this arbitrator made no disclosure whatsoever, and failed to disclose that he had previously even represented the NFL, he was lead counsel for the NFL.

THE COURT: I think you can make all this points in your papers.

MR. ZASHIN: Your Honor, but I think it would be important to know how much money the NFL paid this law firm during the course of this arbitration, because I think that --

THE COURT: It might or might not be. I don't know that it will be.

MR. ZASHIN: I agree, your Honor, but that's the

point. If you found out, for example, your Honor, that the NFL paid Wilmer Hale $10 million in the year of this arbitration, 2016, I think that Second Circuit law would say that's a problem for this arbitrator to serve.

THE COURT: Right. It may be. I think the way we are going to do this is you are going to make your motion, they will make their parallel motion, and then if there are factual disputes that I think would be material to resolving whether or not the arbitral award can be confirmed or whether it needs to be vacated, then I guess we flesh that out more. But it seems to me, at least at this point, it is not obvious that that is going to be needed, and according to defendants it is not going to be needed at all. So I think we will do it in stages. If you survive the first stage, then we will see where we are after that.

But what are you guys doing in the meantime? Right? You guys haven't answered. There is nothing on the docket sheet at this point, right?

MS. DIAZ: Yes, your Honor. We did submit a letter requesting an extension of our time to file a responsive pleading because we do believe that the motion to vacate, along with the motion to dismiss, will dispose of the claims against the NFL. So for purposes of efficiency and conserving our client's resources, we don't think that we should be required to answer until after --

THE COURT: But what is the answer going to look like in this case?

MS. DIAZ: Your Honor, we are perfectly ready and willing to submit an answer, but we don't think that it will provide Mr. Zashin with any information that will be useful; and, as I said, we believe, from a cost efficiency perspective, it makes sense to defer the filing of our responsive pleading.

THE COURT: It is always sort of a weird area in that the pleadings, unlike a regular complaint, it is very clear what follows. You either makes a motion to dismiss or you answer. That's basically the way you do it. For these, the petition itself is a petition, and then typically courts will, at least in this district, will ask the petitioner to make his motion to vacate even though the petition effectively does that already. Other courts don't do it that way they don't make the petitioner make a separate motion. They basically just ask for briefing on the petition. I don't think it matters that much, but in terms of the formalities of pleading, I don't want to leave here today until I figure out what your respective views are on the formalities of pleading.

MS. DIAZ: Correct, your Honor. In some ways, I think this is what perhaps what you are getting at, in some ways our opposition to his motion to vacate is a responsive pleading in a very loose term.

THE COURT: It's often a cross motion to confirm. Are

contemplating that or no?

MS. DIAZ: No, your Honor. We believe that the opposition to the motion to vacate suffices.

THE COURT: But, I mean, certainly procedurally that's often the way they do it. Petitioner makes his motion to vacate. The other guys come roaring back and say, Great, we want to make a motion to confirm the arbitral award. They are mere images of each other. But they are not an answer like you would have in a complaint. But here there are individual causes of action against at least some of the defendants.

Mr. Nash.

MR. NASH: Yes. We would be happy to make a motion to confirm. Again, consistent with being efficient, it is unnecessary. We don't need to confirm the award. Mr. Johnson has already served the suspension, so this is not a situation like the *Brady* case, for example, where it is presuspension and there needed to be an order that was enforceable. Mr. Johnson went through his arbitration, he served the suspension, and now has belatedly filed this petition to vacate. So that's why, in our view, it is just not necessary for the award to be confirmed. But we can certainly ask for that if you think that's going to clean things up. But I think Ms. Diaz is absolutely correct, your Honor. If the motion to vacate is denied, the claims against the NFL are over.

THE COURT: And you are planning to respond to the

motion to vacate, and Mr. Zashin do you have a view in terms of the formality of pleading at this point?

MR. ZASHIN: Yes, your Honor. I would make one point, which is that we filed a 57-page complaint, which contains very factually specific information. The rules do not provide for the NFL simply to not answer. We believe that the reason why the NFL doesn't want to answer the complaint is because it will have to make admissions that go directly to the motion to dismiss that has been contemplated by the NFLPA. We believe that the NFL has to respond, either has to admit or deny that which is contained in the complaint, and we believe that that information will inform the court relative to whether or not factual disputes actually do exist, because we pled this complaint very specifically relative to the infirmities of the arbitration in question here.

THE COURT: I am just looking at the pleading. This is the one that was filed in Ohio, right? The first amended complaint, that's what we are talking about.

MR. ZASHIN: Correct.

THE COURT: First amended complaint and petition to vacate arbitration award.

MR. ZASHIN: Correct, your Honor.

THE COURT: So your view is that they have an obligation under the federal rules to answer or what, move to --

MR. ZASHIN: They can file under Rule 12(b) or they can answer. But they have done nothing. And pursuant to your individual rule, your Honor, 1(c), they had to file a letter two days before, otherwise they don't get the right to the extension. And in this particular case they have had this first amended complaint for months. They need to respond to it. They are out of rule.

THE COURT: I'm not sure about that, candidly.

MR. ZASHIN: But I think, your Honor, the facts that are contained in the complaint are informative, and for purposes of the NFL having to either admit or deny these things, that goes directly to the motion to dismiss that's contemplated by the NFLPA.

THE COURT: It goes directly -- say that again.

MR. ZASHIN: Sure. Because effectively, your Honor, this is a 301 type of case, there are two things that have to be proven: one, that there was a breach of contract; and, two, that the union breached its duty of fair representation. There are certain allegations contained in this complain that we believe the NFL can't answer because they establish the breach of contract. It is very clear that the terms of this 2015 policy were not adhered to. Those admissions, by virtue of what the NFL has to put into writing, are admissions that can be used against it for purposes of establishing our claims and therefore would defeat the union's motion to dismiss. And

there is no basis for the union or for the NFL to not respond to the complaint.

THE COURT: I guess they could make a motion to dismiss, then, as well.

MR. ZASHIN: But they haven't done so, your Honor.

THE COURT: No, I get it. Well, some set of defendants is contemplating a motion to dismiss and they are planning to make a motion to dismiss.

Go ahead, Ms. Diaz.

MS. DIAZ: Your Honor, the motion the NFL brought on personal jurisdiction grounds in Ohio, which was denied without prejudice, we might consider bringing another 12(b) motion if we could, but because we brought that motion in Ohio on personal jurisdiction grounds, we cannot bring a successive motion in this district.

THE COURT: I'm not talking about that. We are talking about typically in a complaint, right, the motions that can be made in lieu of an answer would be a motion to dismiss on jurisdictional grounds or failure to state a claim, whatever. I don't know how you can make a motion to dismiss for failure to state a claim on a petition to vacate an arbitral award. Do you think you can?

MR. ZASHIN: Are you speaking to me, your Honor?

THE COURT: Yes, you, Mr. Zashin.

MR. ZASHIN: No, I don't think so. But we have other

causes of action that are contained in here as well. The issues relative to the motion to vacate are only set forth in Counts One through Six. There are other allegations in other counts. There is Count Seven, Eight, Nine, Ten and Eleven that we believe that the NFL should be required to answer those -- should be required to answer the entirety of the complaint because there is more here than just the motion to vacate.

THE COURT: I am just looking at the complaint.

The seventh cause of action is against the NFL Management Council. Eight is against the NFL Players Association.

MR. ZASHIN: Correct.

THE COURT: Ninth --

MR. ZASHIN: Is against --

THE COURT: -- is against the union, right?

MR. ZASHIN: Correct.

THE COURT: Tenth is against the Players Association again. And the eleventh is just really just a request for declaratory judgment.

So the only cause of action that you are really talking about is with respect to the NFL Management Council, right, the seventh cause of action, because everything else is really just a variation on your request to vacate, right?

MR. ZASHIN: Except for claim number nine, your Honor, and that is the violation of the Labor Management Reporting and

Disclosure Act.

THE COURT: By the union now.

MR. ZASHIN: Against the union for purposes that they had to provide under law a copy of the complete agreement under which Mr. Johnson was disciplined. That is one of the issues in this case, which is, at no time was Mr. Johnson afforded with the actual agreement under which he was disciplined.

THE COURT: But Ms. Diaz is not representing the union, so she doesn't have to answer that claim, right?

MR. ZASHIN: But she has to answer the factual allegations surrounding it. The point, your Honor, is that these two parties conspired to not provide the players with the actual terms of the agreement under which they were going to discipline them.

THE COURT: With respect to your ninth cause of action, they are not a party to it.

MR. ZASHIN: They are not a party.

THE COURT: They nonetheless have to answer that cause of action.

MR. ZASHIN: They don't have to answer, but they have to answer the factual averments that relate to it, because it goes to the conspiracy between the parties to not provide the players with the actual terms of the agreement under which Mr. Johnson was disciplined. That's the problem here, your Honor, is that they represented that one agreement applied and

controlled. What we have now come to learn is that is not the case, that there is another amorphous --

THE COURT: Let's start with the one that is an easier one. There is a claim of breach of contract by the NFL Management Council. That's your claim, right?

MS. DIAZ: That's right.

THE COURT: So why don't you need to answer that one? Everything else seems to be just a variation on his motion to vacate, and so I'm not sure what the point of --

MS. DIAZ: Again, your Honor, we are completely fine answering the complaint. The sole reason we requested the extension was because we thought it would preserve our parties' resources and it would be a more efficient way to proceed. But we are perfectly happy to.

THE COURT: Let's just do it. Let's just have you answer, then. I don't think it will take very long. And then we will set a briefly schedule for the motions.

How long do you think you need to brief your motion, Mr. Zashin.

MR. ZASHIN: Your Honor, we had talked about discovery, and obviously we are not getting it, so I would say if we could have 30 days to file.

THE COURT: That's fine.

Mr. Kessler, you are talking about being on the same schedule, right?

MR. KESSLER: That's correct, your Honor.

THE COURT: So your opening brief on the dame date, 30 days.

MR. KESSLER: That would be fine, your Honor.

THE COURT: September 25 is a Monday. Okay? So September 25.

And then how long to respond?

MR. ZASHIN: Your Honor, on behalf of Mr. Johnson, since we assume that the NFL will likewise be filing some form of a motion, I would assume --

THE COURT: They are going to be responding -- well, with respect to the seventh cause of action, the breach of contract, they are either going to answer or they are going to move to dismiss for failure to state a claim, but they haven't talked about making a motion to dismiss, right? So I think otherwise they are just contemplating opposing your motion to vacate. So I don't think they are planning to put anything in until after your opening brief.

MR. ZASHIN: Okay.

THE COURT: Right? That's what you are doing, right?

MS. DIAZ: Yes, your Honor. We would oppose the motion to vacate. In some respects, the NFLPA's motion to dismiss will also address -- the outcome of that position will affect the breach of contract claim as well.

THE COURT: So how long, then, to respond to the

motions?

MR. ZASHIN: 30 days, your Honor?

THE COURT: 30 more days? Okay.

MR. KESSLER: 30 days is fine for us, as well.

THE COURT: Ms. Diaz, that's okay with you?

MS. DIAZ: That's fine.

THE COURT: You folks are going to respond separately or together?

MR. KESSLER: Separately, your Honor.

THE COURT: Separately, okay.

And then a reply brief, two weeks. Is that all right?

MR. KESSLER: Fine.

MR. ZASHIN: That's fine, your Honor.

THE COURT: I don't need a reply if you don't think you want to do one, but if you want to submit a reply, then let's do it two weeks after that. So September 25 for the opening round, then October 25 for the oppositions, and then a reply by November 8. I will issue an order that sets that schedule.

MR. KESSLER: Your Honor, if I may, just because I think, for your Honor's benefit, and also because I feel an obligation to Arbitrator Carter, who has been attacked here in open court in terms of not making disclosures, the system, your Honor, as you could imagine, is the neutral arbitrators are selected by the union and the management council. The

disclosures, which were in fact made, were made to the union and the management council at the time they were selected as a neutral, which is how this is done. So this idea that Mr. Carter was somehow derelict, I feel an obligation to say he was not, and to give your Honor an example of the type of thing --

THE COURT: I don't think I even need that. You are going to bring that out, I assume, in response to the papers --

MR. KESSLER: That's fine, your Honor.

THE COURT: -- by Mr. Zashin.

MR. KESSLER: I just wanted to clarify the record. That's fine.

THE COURT: I don't think we need to get into it any more now.

And the answer, did I give you a date by which to answer?

MS. DIAZ: Not yet.

THE COURT: Two weeks? Is that enough?

MS. DIAZ: That's fine.

THE COURT: I don't think it's going to make much difference to the briefing schedule, so sooner if you can. Okay? And I will issue an order about that, too. Discovery will be stayed. If I think I need some in light of briefing, then I will let you know that. If I think I need oral argument, I will let you know that, too. I don't always.

Frankly, I think to front load it up at a premotion conference is more useful from my perspective, so I don't always bring you back. But if I think you need it, then I will schedule something. Okay?

All right. Anything else we should cover today, Mr. Zashin?

MR. ZASHIN: Just one thing, your Honor. Your individual order indicates that we cannot have more than 15 exhibits, and I am a bit concerned relative to the number of documents associated with this particular case. I would just simply request that that number be extended because I think it is important to inform the court relative to the various agreements that are at issue in this particular case.

THE COURT: That's fine. Do you have a sense as to by how much?

MR. ZASHIN: I would say, your Honor, if we could have a limitation of 40 exhibits? I am simply trying to give you -- I don't want to come back and ask for more, your Honor.

THE COURT: You can always ask for more. I'm not too worried about that. Look, I have general rules that I think are designed to fit most cases. They don't fit all cases, and I have no illusions that they do. So there are times when it is appropriate to relax those kinds of rules, so I don't mind doing it. I don't know. 40 might be more than you need, but, all right, I will allow up to 40 exhibits.

MR. ZASHIN: Thank you, your Honor.

THE COURT: All right. Great.

Thanks very much. I appreciate it. It is always good to have smart, responsive lawyers who are respectful and thoughtful and prepared. So you delivered on all of those things, so I appreciate it.

If you need a copy of the transcript, you can take that up with the court reporter, but I am now even farther behind. I never double book matters. Sometimes I miscalculate in terms of length. So you can just take it up with the court reporter through the Web site.

Let me thank the court reporter, as always, for her time and her talents.

You folks enjoy the rest of the summer.

COUNSEL: Thank you, your Honor.

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